

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ERIN CYRKIN, Plaintiff,

v.

NEW YORK STATE DEPARTMENT OF LABOR,
Supervisor Barbara Weymouth, &
Manager Patricia O'Reilly,
Individually,
as Aiders and Abettors,

Defendant (s).

COMPLAINT

Civ. Cas. No.:

JURY TRIAL DEMAND

NATURE OF THE ACTION

1. The Plaintiff, ERIN CYRKIN, ("Plaintiff"), brings this lawsuit against the Defendants, NEW YORK STATE DEPARTMENT OF LABOR ("DOL"); Supervisor Barbara Weymouth; and Manager Patricia O'Reilly, Individually as Aiders and Abettors, pursuant to the Rehabilitation Act, codified at 29 U.S.C. § 701, which expressly incorporates by reference the anti-retaliation proviso of §12203(a) of the Americans with Disabilities Act, and for violations of the New York State Human Rights Law, Executive Law § 290 *et seq.* ("NYSHRL") against the Defendant, the NEW YORK STATE DEPARTMENT OF LABOR ("Defendant").

JURISDICTION AND VENUE

2. Jurisdiction of this court is invoked under 29 U.S.C. § 701; 28 U.S.C. §1331; and 28 U.S.C. §1343(a)(4).

3. Venue in this District is proper as both Plaintiff and Defendant reside in this District. The Court has pendent jurisdiction over Plaintiff's state law claims.
4. The employment practices hereinafter alleged to be unlawful were committed in the Western District of New York.

PARTIES

5. The Plaintiff resides in Monroe County and had been employed by the Defendant since March of 1983. At all times relevant hereto, Plaintiff was an "employee" of Defendant as such term is defined in the Rehabilitation Act.
6. At all times relevant hereto, Defendant DOL was, and, upon information and belief, is a municipal corporation doing business in Rochester, New York. Defendant has employed, and continues to employ in excess of 500 employees.
7. At all times relevant hereto, Defendant DOL has continuously engaged in an industry effecting commerce within the meaning of the Rehabilitation Act, and is a recipient of federal funding.
8. Defendants Supervisor Barbara Weymouth, and Manager Patricia O'Reilly, Individually as Aiders and Abettors, are sued in their capacities as supervisors under the

New York State Human Rights Law, Executive Law, § 296
(6).

FACTS

9. Plaintiff was hired by the Defendant DOL as an "Agency Services Representative" in or about March of 1983.
10. Plaintiff maintained an above average work record throughout the course of her employment with Defendant.
11. On May 20, 2010, Plaintiff underwent surgery to her thumb and wrist, which involved removing a portion of Plaintiff's wrist and moving the thumb in place along with a ligament transplant, which significantly impaired one or more "major life activities."
12. The "major life activities" as defined by the Rehabilitation Act which affected Plaintiff included "caring for oneself...concentrating, thinking, communicating and working."
13. Further, for all relevant times herein, Defendant regarded Plaintiff as having such an impairment under the Rehabilitation Act.
14. Defendant regarded Plaintiff as substantially limited in the major life activities enumerated above, and subjected her to a hostile environment because of a perception that Plaintiff was unable to perform her work duties.

15. In or about the same time as Plaintiff underwent surgery, Defendant became aware of Plaintiff's disability because Plaintiff's husband gave Supervisor Barbara Weymouth ("Weymouth"), a doctor's note stating that Plaintiff would need voice activated software due to her inability to type.
16. On September 1, 2010, Plaintiff returned to work with medical restrictions stating that Plaintiff could do limited continuous writing, 10-15 pound lifting with both hands, and that Plaintiff may need to take breaks during the day due to pain.
17. Plaintiff had only thirty (30) percent mobility in her left hand and five (5) percent in her thumb.
18. Upon her return, Plaintiff was informed that the voice activated software she needed was not yet available.
19. When Plaintiff attempted to return to work after surgery with restrictions, Plaintiff was denied the opportunity to perform the essential functions of her job based on Defendant's perception that she was unable to do so.
20. Instead, Patricia Reilly, Plaintiff's manager, told Plaintiff that they would "have a meeting" by the end of the week so they knew "what jobs Plaintiff felt she could do."

21. Thereafter, on September 3, 2010, Plaintiff was assigned to "phones and written" for the first time in over a year.
22. Plaintiff's assignment to "phones and written" included a great deal of computer work, in spite of her condition.
23. At around 4:15 p.m. on September 3, 2010, Plaintiff asked Supervisor Weymouth about the assignment, expressing her concern that it would be too much for her hands and requested a new assignment.
24. Instead of complying with Plaintiff's reasonable request for accommodation, Supervisor Weymouth replied "*maybe you should have stayed out of work longer.*"
25. When Plaintiff replied that she did not have the financial means to stay out of work longer, Supervisor Weymouth replied "*then maybe you should learn to write with your feet.*"
26. On September 7, 2010, Plaintiff emailed Supervisor Weymouth to inquire as to whether her assignment would be changed, to which Weymouth replied that Plaintiff would be on "phones and written" that morning and all the following day.
27. Plaintiff then sent another email explaining that she had a reasonable accommodation request for voice

- activated software that was pending.
28. Plaintiff also explained that being assigned to "phones and written" compromised her medical condition and caused a problem with her existing disability.
 29. Plaintiff continued to suggest jobs that she could perform to no avail.
 30. Supervisor Weymouth replied that she thought they should have a meeting to try to discern what office duties would be "more desirable" for Plaintiff given her condition.
 31. Supervisor Weymouth asked Plaintiff to prepare a list of what duties she would feel comfortable performing.
 32. On October 1, 2010, Plaintiff provided updated medical restrictions from her doctor.
 33. On September 8, 2010, Plaintiff met with Manager O'Reilly, Supervisor Weymouth, and Michael Wright ("Wright"), another of Plaintiff's supervisors.
 34. During the meeting, Wright badgered Plaintiff with questions about when she would feel "better", what was "wrong" with her hand and thumb, et cetera.
 35. Plaintiff explained that arthritis is a permanent condition and that at the current time she had only thirty (30) percent mobility in her hand and seven (7) percent mobility in her thumb.

36. Plaintiff was then told she would be "assigned to workshops, re-employment services orientation, and job search preparation, phone with a headset, switchboard, 599 questions, resource room, faxing 599 forms and exit reports."
37. Plaintiff then called Affirmative Action Director for the Department of Labor Helen Szvoren ("Szvoren")
38. Plaintiff apprised Szvoren of her situation, who in turn agreed to go to Plaintiff's office and speak to her supervisors about the seriousness of Plaintiff's request for accommodations.
39. On October 1, 2010, Plaintiff again provided updated medical information and restrictions to Supervisor Weymouth and Manager O'Reilly.
40. Later that same day, Szvoren came to Plaintiff's office to speak to her supervisors about Plaintiff's situation.
41. On October 5, 2010, Plaintiff had a meeting with Manger O'Reilly and Supervisor Weymouth wherein she was informed her job duties would include "workshop presentations, resume review, IA and OSOS updates, 599 services from management reports, 599 exit reports and half days on phones and written."

42. On October 7, 2010, Plaintiff received an email from Manager O'Reilly requesting Plaintiff meet with her when she was available.
43. Upon meeting with Manager O'Reilly, Plaintiff was asked if she had taped a previous meeting with her. Plaintiff admitted to doing so.
44. Manager O'Reilly then admonished Plaintiff for recording their meeting and excused her from her office.
45. On October 25, 2010, Plaintiff sent the following email to Manager O'Reilly and Supervisor Weymouth, stating:

"Please be advised that I have previously requested an accommodation for my known disabilities, severe chronic arthritis that impeded my ability to write and perform manual tasks. I hereby request that you re-consider my request for reasonable accommodations based upon my updated restrictions from my physician. Please engage in the interactive process with regard to the same."
46. On October 25, 2010, Plaintiff provided updated medical information stating that her doctor **ordered her not to do computer work until the voice activated software she had requested arrived.**
47. Manager O'Reilly then forwarded the update to several other administrators.
48. Administrator Joan Pozza replied to the email, stating that the program had been ordered September 3, 2010, but was not yet received.

49. On October 25, 2010, a meeting was held, the minutes of which are as follows:

"On Monday, 10/25/10, Erin provided an updated medical dated 10/21/10 in which it was written "Can't do computer work until voice activated system is in." Due to scheduling we were not able to meet until 10/29/10 to reassess work duties in regard to this updated medical. During this meeting it was discussed the types of duties Erin could perform that did not involve computer data entry. Follow-up with the Purchase Office indicated that the voice activated software that was initially ordered is obsolete. Purchase updated the software order and requested that the order be expedited. The duties that were discussed and agreed upon that Erin can do with in her physical restrictions are:

Job Search Prep Workshop and Preparation Group Orientation/RSO and Preparation Office will adjust the scheduling of these workshops to ana AM and PM session Traffic Control; Greeter Mock Interviews. Will shadow Mock Interviews to become familiar with the process UI Questions, staff will refer customer's to Erin Assist customers as needed with completing UI forms if customers come to office. Assist customers in the Resource Room who are working to file a UI Claim or need to complete form. Will talk customers through the on line process Become familiar with Resource Room activity and Computer Sites, where can talk customer through the various sites Shadow RR so that can be put in the assignment as needed. In addition each of us, including Michael Wright, would be thinking about additional duties that Erin can do.

50. On December 17, 2010, Plaintiff interviewed for the position of Employment Services Representative position, which would have been a promotion.
51. Plaintiff learned upon arriving at the interview that one of the panel members that would be interviewing her was Manager O'Reilly.

52. Less than two weeks after her interview, Plaintiff received a letter indicating she was no longer being considered for promotion.
53. On January 5, 2011, the voice activated software finally arrived.
54. Plaintiff was excited and relieved, *until* a staff member from information technology informed her that the software was not compatible with the OSOS computer program utilized by the DOL.
55. Plaintiff was then told by Manager O'Reilly to "figure out a way to get it to work with our program."
56. Plaintiff, although confused and upset, made an effort to make the software work with the office computer system.
57. On January 7, 2011, Plaintiff was sitting at the desk of a co-worker when Wright approached her and told her co-worker that a 599 meeting would be starting shortly.
58. Plaintiff commented that she did not know there was a meeting scheduled, to which Wright replied "I guess you can come."
59. Plaintiff was never informed by Manager O'Reilly of the meeting.
60. At 11:43 A. M. Plaintiff emailed Weymouth and Wright telling them that the way in which her request for

accommodations has been a humiliating and trying experience, and that she felt as though she was being treated in a discriminatory fashion because of her disability.

61. In their meeting to discuss the email from Plaintiff, Plaintiff was told that she could write job orders "*if she could figure out how to use the software.*"
62. On or about January 18, 2011, Plaintiff went out on medical leave.
63. On or about August 2011, Plaintiff's doctor wrote a medical report stating that Plaintiff would be able to return to work on January 3, 2012, which was faxed to Defendant in Albany.
64. Pursuant to her doctor's orders, Plaintiff returned to work in the Job Bank Division with a restriction stating that Plaintiff was not to have public contact.
65. Upon information and belief, employees of the Job Bank Division do not have public contact as part of their regular work assignments.
66. Upon her return, Plaintiff waited over an hour for a supervisor to give her a work assignment.
67. Supervisor Weymouth informed Plaintiff that she should contact Personnel Administrator Alejandra Stein ("Stein").

68. Stein stated that she had received Plaintiff's medical restrictions and that "*since your medical stated that you should avoid public contact, and since that is a large part of your job, you need to leave immediately.*"
69. When Plaintiff told Stein that nobody in the Job Banks Division had public contact, Stein stated "take it up with the Division of Equal Opportunity Development."
70. By its conduct as set forth above, Defendant has engaged in unlawful employment practices in violation of the Rehabilitation Act at their Rochester, New York facility.
71. These practices include without limitation, refusing to provide Plaintiff with reasonable accommodations for her disability, and retaliating against her for seeking reasonable accommodations as result of her disability and Defendant's perception thereof.
72. These unlawful practices were intentional on the part of Defendant and its management.
73. These practices have caused Plaintiff damages, deprived Plaintiff of equal employment opportunities and otherwise adversely affected Plaintiff because of her disability.

FIRST CAUSE OF ACTION

VIOLATION OF THE REHABILITATION ACT

74. The above stated paragraphs are incorporated by reference as if fully set forth herein.
75. The Defendant is a recipient of federal financial assistance, thereby qualifying as an employer for the purposes of the Rehabilitation Act.
76. By its conduct as set forth above, Defendant has engaged in unlawful employment practices in violation of the Rehabilitation Act, at their Rochester, New York facility.
77. These practices include without limitation, refusing to provide Plaintiff with reasonable accommodations for her known disabilities, retaliating against her for seeking reasonable accommodations as a result of her disability and/or perceived disability.
78. These unlawful practices were intentional on the part of the Defendant, and its management.
79. These practices have caused Plaintiff damages, deprived Plaintiff of equal employment opportunities and otherwise adversely affected Plaintiff because of her disability.

SECOND CAUSE OF ACTION

RETALIATION UNDER THE REHABILITATION ACT

80. Plaintiff incorporates the above stated paragraphs as though they were fully stated herein.
81. The Rehabilitation Act, 29 U.S.C. § 794a(2), expressly incorporates Title VI's provisions, including the anti-retaliation regulation, 34 C.F.R. 100.7 (e).
82. Plaintiff need not be disabled to have standing to invoke the anti-retaliation provisos of the Rehabilitation Act; further, as stated above, Defendant is a recipient of federal funding and is a qualified employer under the Act.
83. Plaintiff engaged in protected activity under the Rehabilitation Act when she requested that the Defendants engage in the interactive process.
84. Shortly thereafter, Plaintiff was subject to retaliation in the work place as a result of advocating for her rights under the Rehabilitation Act that would dissuade a reasonable person from making a further complaint of discrimination in the workplace. In particular, Plaintiff was subject to the following retaliatory actions that were causally related to her engaging in protected activity under the Rehabilitation Act as set forth above in ¶¶ 45-71.

85. Defendant cannot demonstrate that it would have taken any of the aforementioned retaliatory actions taken in response to Plaintiff engaging in protected activity under the Rehabilitation Act.
86. Defendant had no legitimate business reason for these actions.
87. As a direct and proximate result of Defendants' willful, knowing and intentional discrimination against her, Plaintiff has suffered and will continue to suffer severe mental anguish and emotional anguish and emotional distress; she has incurred and will continue to incur medical expenses for treatment by health care professionals, and for other incidental expenses, and he has suffered and will continue to suffer a loss of earnings and other employment benefits and job opportunities. Plaintiff is thereby entitled to general and compensatory damages in amounts to be proven at trial.
88. As a further and proximate result of Defendants' violations of the Rehabilitation Act, Plaintiff has been compelled to retain the services of counsel in an effort to enforce the terms and conditions of the employment relationship with Defendants and each of them, and has thereby incurred and will continue to

incur, legal fees and costs, the full nature and extent of which are presently unknown to the Plaintiff.

Plaintiff requests that attorney fees be awarded.

89. Defendants' conduct as described herein was malicious and oppressive, and done with a conscious disregard of Plaintiffs rights. The acts were performed with the knowledge of defendants' economic power over Plaintiff. Defendant ratified the unlawful conduct of its employees in this action. Consequently, Plaintiff is entitled to punitive or exemplary damages from all Defendants.

THIRD CAUSE OF ACTION

VIOLATION OF THE NEW YORK STATE HUMAN RIGHTS LAW, EXECUTIVE LAW § 290 et seq. (ALL DEFENDANTS)

90. The above stated paragraphs are incorporated by reference as if fully set forth herein.

91. By its conduct as set forth above, Defendant has engaged in unlawful employment practices in violation of the New York State Human Rights Law, Executive Law, § 290 et seq., at their Rochester, New York facility.

92. These practices include without limitation, refusing to provide Plaintiff with reasonable accommodations for his disability, retaliating against her for seeking reasonable accommodations and terminating her

employment as a result of her disability and/or perceived disability.

93. These unlawful practices were intentionally on the part of the Defendant and its management.
94. These practices have caused plaintiff damages, deprived Plaintiff of equal employment opportunities and otherwise adversely affected Plaintiff because of her disability.

WHEREFORE, Plaintiff respectfully claims the following relief:

1. That this court assume jurisdiction over this action;
2. Judgement in favor of Plaintiff for back pay and the value of lost employment benefits as may be found by a jury;
3. Judgement in favor of Plaintiff for compensatory damages;
4. An award for reasonable attorney's fees and costs; and
5. Such other and further relief as this court may deem just, equitable and proper.

Dated: February 22, 2013
Rochester, New York

By:

CHRISTINA A. AGOLA, PLLC

/s/ Christina A. Agola, Esq.

By:

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